

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. WALTER LAVAR WRIGHT

**Direct Appeal from the Circuit Court for Bedford County
No. 1630, 16354 Robert Crigler, III, Judge**

No. M2008-02084-CCA-R3-CD - Filed March 17, 2010

Defendant, Walter Lavar Wright, entered a plea of guilty in case no. 16350 to the sale of more than 0.5 grams of cocaine, and to possession of more than 0.5 grams of cocaine with the intent to sell, both Class B felonies. Defendant entered a plea of guilty in case no. 16352 to the sale of more than 0.5 grams of cocaine, a Class B felony. Sentencing determinations in both cases were left to the trial court. Following a sentencing hearing, the trial court denied Defendant's request for alternative sentencing and sentenced Defendant to concurrent sentences of nine years for each of his three convictions, for an effective sentence of nine years. On appeal, Defendant argues that the trial court erred in denying his request for alternative sentencing and in determining the length of his sentences. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. Appeal as of Right; Judgments of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Donna Orr Hargrove, District Public Defender; Michael J. Collins, Assistant Public Defender; A. Jackson Dearing, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Walter Lavar Wright.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Michael D. Randles, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The State recited the following factual basis in support of Defendant's pleas of guilty at the guilty plea submission hearing:

In case [no.] 16350 these events occurred on January 24th, 2007. Agents of the Drug Task Force were working in conjunction with a confidential informant and the confidential informant had a number of conversations with a Paulette Winters about purchasing crack cocaine. A great many of them had to do with whether Ms. Winters was back in her residence with the crack cocaine. Ultimately she indicated she was ready; [she] told the confidential informant to come over. The confidential informant was searched and the vehicle was searched. That met with negative results. The confidential informant then went to Paulette Winters' residence, which was here in Bedford County. Once there, Ms. Winters indicated that [Defendant] will take care of you. The confidential informant was directed to [Defendant] where [Defendant] sold crack cocaine to the confidential informant and received \$100 in exchange. The confidential informant then departed and returned to the agents and turned the crack cocaine over to the agents. It was sent to the lab. It weighed [0.6] grams.

Still on that same day, agents of the Drug Task Force executed a search warrant on this residence and [Defendant] was present; Paulette Winters was present; and a number of other adults were present. They were all dismissed except for [Defendant] and Ms. Winters. During the search digital scales were found. The \$100 of buy money from the buy that had been made earlier that day was found. A quantity of money was found; going to be over \$500, which included the \$100. Then crack cocaine was found. There were two different quantities found. One weighed 12.7 grams and the other weighed 6.9 grams. I think if my feeble math skills are correct, that is 19.6 grams of crack cocaine that [was] found.

[Defendant] was interviewed and he admitted that he had been involved in the distribution of crack cocaine. He indicated that he was – the crack cocaine actually belonged to Paulette Winters; but that was the crack cocaine he was selling and he would make deliveries for her and collect money for her and things like that; [he] would typically turn the money back over to her. He

also admitted that he had been involved in selling a small amount of crack cocaine earlier in the evening, which, of course, would be our controlled buy.

In case number 16352 these events occurred on January 19, 2007. Again the confidential informant is engaging in a series of conversations with Paulette Winters about the purchase of crack cocaine. Ultimately the confidential informant went to the same residence with \$240. The purpose was to pay on a drug debt the confidential informant owed Paulette Winters and also to make an additional purchase of crack cocaine for \$200. The confidential informant was searched. That met with negative results. The confidential informant then went to this residence, paid \$40 directly to [Ms.] Winters on the old debt, then gave \$200 to [Defendant] for the purchase of crack cocaine. [Defendant] then handed the crack cocaine back to the confidential informant who departed; met back up with the agents; turned it over to the agents. It was crack cocaine weighing 1.1 grams.

At the sentencing hearing, the parties agreed to stipulate that Tim Lane, the Director of the Drug Task Force, if he were called as a witness, would testify “that crack cocaine is the drug that creates the biggest problem among drugs in this Judicial District and there is a need for deterrence.”

Defendant’s presentence report was introduced as an exhibit without objection. Defendant, who was twenty-eight years old at the time of the sentencing hearing, reported that he attended high school in Florida and obtained his G.E.D. in Kentucky in 1997. Defendant stated that he was divorced and had three daughters. Defendant did not report that he paid any child support. Defendant’s fiancée, Kimberly Anderson, was pregnant at the time of the sentencing hearing. Defendant reported a sporadic work history which included brief periods of employment by QSI-Randstad Employment and Dealer’s Choice, Inc. Defendant stated that he began working for a Wal-Mart distribution center five days before he was arrested, and he was fired from that position as a result of his arrest.

Defendant does not have any prior criminal convictions. However, Defendant was charged with domestic assault, a Class A misdemeanor, and was granted pre-trial diversion on June 27, 2006, to expire after eleven months, twenty-nine days. *See* T.C.A. §§ 39-13-101, -113. According to the presentence report, a notice of termination of the judicial diversion was filed on April 18, 2007, and served on Defendant on May 30, 2008. The final disposition of this case was still pending at the time of the sentencing hearing.

Defendant provided the following statement during the preparation of his presentence report:

My invol[ve]ment in the mat[t]er of my offense is very little. I just did what I was told [which] was if Mrs. Paulette Winters was gone or going somewhere she would tell me someone was comeing [sic] to her place to give them what she left for them and when she got back I would give her all the money[.] If she was around I would just do what she asked me too [sic]. I would get little or no money at all. I just thought I was doing her a favor when she ask[ed] me to the little things she asked.

At the sentencing hearing, Defendant testified that he had not included all of his work history in the presentence report. Defendant said that he worked at a poultry production facility for one year in 1996 or 1997, and had done “other little odd jobs.” Defendant acknowledged that he had several periods of unemployment over the years, and that his mother, Joyce Wright, helped him financially.

Defendant said that Ms. Winters was his ex-wife’s aunt. Defendant stated that he sold and delivered cocaine as a favor for Ms. Winters. Defendant said, “I wasn’t looking at myself as getting in trouble for it. . . . Every now and then she would give me \$20 or something for just doing that for her.” Defendant explained, “It is not like I was getting real money for doing it.” Defendant acknowledged that his conduct was wrong and said that he hoped the trial court would consider some form of alternative sentencing so that he could be with his family. On cross-examination, Defendant acknowledged that two of his children were present when the search warrant was executed at Ms. Winters’ residence, but he explained that they were playing outside.

The trial court acknowledged that Defendant did not have a lengthy criminal history but found that he was on pre-trial diversion when he committed the current offense. *See* T.C.A. § 40-35-114(13)(F). Based on this factor, the trial court sentenced Defendant as a Range I, standard offender, to nine years for each conviction. In considering Defendant’s request for alternative sentencing, the trial court found that Defendant had a very poor work history and social history. The trial court also found that a measure less restrictive than confinement had recently been unsuccessfully applied to Defendant, that confinement was necessary to avoid depreciating the seriousness of the offense, and that a sentence of confinement was particularly suited to serve as a deterrence to others and to Defendant. The trial court accordingly denied Defendant’s request for alternative sentencing and ordered Defendant to serve his sentence in confinement.

On appeal, Defendant submits that he has no prior criminal history other than the one charge for domestic violence, and he contends that he was not benefitting from his criminal conduct which was the basis for the current charges. As a result, Defendant argues that the

trial court erred in sentencing him to a sentence above the minimum sentence in his sentencing range and in denying his request for alternative sentencing.

II. Standard of Review

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. *See* T.C.A. § 40-35-401, Sentencing Comm’n Comments; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correctness, however, “‘is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.’” *State v. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 Tenn. 1991)). “If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails,” and our review is de novo. *Carter*, 254 S.W.3d at 345 (quoting *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); *State v. Pierce*, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant’s own behalf about sentencing. T.C.A. § 40-35-210(b); *see also Carter*, 254 S.W.3d at 343; *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002).

Tennessee’s sentencing act provides:

(c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

T.C.A. § 40-35-210(c)(1)-(2).

The weight to be afforded an enhancement or mitigating factor is left to the trial court's discretion so long as its use complies with the purposes and principles of the 1989 Sentencing Act and the trial court's findings are adequately supported by the record. *Id.* § (d)-(f); *Carter*, 254 S.W.3d at 342-43. "An appellate court is therefore bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in ... the Sentencing Act." *Carter*, 254 S.W.3d at 346. Accordingly, on appeal we may only review whether the enhancement and mitigating factors were supported by the record and their application was not otherwise barred by statute. *See id.*

A. Length of Sentence

Defendant was convicted of three Class B felonies as a Range I, standard offender, and was therefore subject to a sentence of between eight and twelve years for each conviction. *See* T.C.A. § 40-35-112(a)(2). In its brief, the State argues that the trial court properly enhanced each of Defendant's sentences by one year based on enhancement factor (8), that Defendant has previously failed to comply with the terms of a sentence involving release into the community. *Id.* § 40-35-114(8). According to our review of the record, however, the trial court enhanced Defendant's sentence because he was on pre-trial diversion when he committed the current offenses. *See* T.C.A. § 40-35-114(13)(F) (providing that a sentence may be enhanced if the defendant is on some form of judicially ordered release at the time of the commission of the offense). Defendant acknowledges that he was on pre-trial diversion when he committed the instant offenses, and he does not challenge the trial court's consideration of this enhancement factor on appeal. Defendant contends, however, that the weight assigned to the one enhancement factor by the trial court did not comply with the "purposes and principles" of the Sentencing Act.

Defendant's argument on appeal essentially challenges the weight assigned to this enhancement factor by the trial court which is no longer grounds for an appeal. *Carter*, 254 S.W.3d at 344. The record indicates that the trial court considered the applicable sentencing principles and noted its factual findings regarding Defendant's status on pre-trial diversion at the time he committed the offenses. The trial court set Defendant's sentences within the statutorily prescribed sentencing range for a Range I, standard offender. Based on our review we conclude that Defendant's nine-year sentences were imposed in a manner consistent with the principles and purposes of the Sentencing Act. Defendant is not entitled to relief on this issue.

B. Alternative Sentencing

Defendant argues that the trial court erred in denying his request for some form of alternative sentencing. Defendant submits that he only engaged in the illegal conduct as a favor to Ms. Winters, and he did not financially benefit from the transactions. Defendant contends, therefore, that circumstances surrounding his offenses were not of such an "excessive or exaggerated degree" that alternative sentencing would not have been appropriate.

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(5), (6). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider" them. *Id.* § 40-35-102(6).

In the instant case, Defendant was convicted of three Class B felonies and is therefore not considered a favorable candidate for alternative sentencing. Nonetheless, he remains eligible for an alternative sentence because his sentences were each ten years or less, and the offenses for which he was convicted are not specifically excluded by statute. *Id.* §§ 40-35-102(6), -303(a). If a defendant seeks probation, then he or she bears the burden of "establishing suitability." T.C.A. § 40-35-303(b). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." *Id.* § 40-35-303, Sentencing Comm'n Cmts.

The following considerations provide guidance regarding what constitutes “evidence to the contrary:”

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1); *see also Carter*, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant’s potential for rehabilitation or treatment in determining the appropriate sentence. *Id.* § 40-35-103(5).

In denying Defendant’s request for alternative sentencing, the trial court considered Defendant’s social and work history. Defendant reported only sporadic employment with extensive periods of unemployment during which he relied upon his mother’s support. The trial court also noted that two of Defendant’s children were present when the search warrant was executed and 19.6 grams of cocaine discovered in the residence. The trial court also considered the fact that a measure less restrictive than confinement had recently been extended to Defendant, and Defendant acknowledged that his pre-trial diversion was termination as a result of the commission of the current offenses. The trial court noted the parties’ stipulation as to what the director of the Drug Task Force would testify to regarding the need for deterrence in cocaine cases. Moreover, Defendant acknowledged that his conduct was wrong but persistently maintained that he was only selling cocaine “as a favor,” and was not receiving any financial benefit other than periodic payments of small sums of money. Defendant’s minimization of the nature of his conduct and his failure to take responsibility for his actions reflect poorly on his potential for rehabilitation.

Based on our review, we conclude that the record amply supports the trial court’s denial of Defendant’s request for alternative sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

After a through review, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE